

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ERNEST P. O'CONNOR, JR.,)	
)	
Plaintiff)	
)	
v.)	Civil No. 94-70-B
)	
DEBRA HUARD,)	
)	
Defendant)	

ORDER ON PLAINTIFF'S MOTION
FOR ATTORNEY FEES UNDER 42 U.S.C. § 1988

Plaintiff Ernest P. O'Connor, Jr. brought this action against Defendant Debra Huard and other Defendants alleging violations of his federal constitutional rights under 42 U.S.C. § 1983. The Complaint was filed on March 18, 1994. Subsequent to the filing of the Complaint, Plaintiff filed motions for appointment of counsel which were denied. During the course of litigation all of defendants were dismissed, except Defendant Debra Huard. On June 20, 1995, Plaintiff again filed a Motion for Appointment of Counsel.

Federal Courts are authorized to request the assistance of *pro bono* counsel pursuant to 28 U.S.C. § 1915(d). *See Mallard v. District Court*, 490 U.S. 296 (1989). However, unlike other districts, this Court has no access to resources for appointing *pro bono* counsel to represent qualified indigent prisoners with civil rights complaints. The Court does not maintain a special fund for reimbursement of costs incurred by volunteered attorneys. The absence of a source of funds for reimbursement of costs and payment of fees incurred by volunteered attorneys serves as

a major obstacle to the Court's ability to request the assistance of counsel. There is a lack of sufficient incentive to counsel to overcome their concerns about exposure to potential liability.

At the request of the Court, on June 23, 1995, Attorney William C. Knowles entered his appearance as attorney for Plaintiff Ernest P. O'Connor, Jr. Mr. Knowles was instructed by the Court that his appearance would be on a *pro bono* basis and attorney's fees would only be awarded in the event they were appropriate under 42 U.S.C. § 1988.

A jury trial concluded in this matter on June 5, 1996, with the jury returning a verdict for Plaintiff in the amount of \$1.00 nominal damages. Plaintiff has filed a Motion for Attorneys Fees pursuant to 42 U.S.C. § 1988. Defendant concedes that Plaintiff is, at least technically, a "prevailing party" under *Farrar v. Hobby*, 506 U.S. 103 (1992). She correctly notes, however, that Plaintiff is not automatically entitled to attorneys fees by virtue of his status as a prevailing party. "Although the 'technical nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988.'" *Id.* at 114.

A. Whether Plaintiff is entitled to fees.

In *Farrar*, plaintiff brought suit against six defendants seeking Seventeen Million Dollars in compensatory damages. The suit lived for ten years, after which plaintiff recovered One Dollar from one defendant. The Supreme Court agreed with the Court of Appeals' overturning an award of \$280,000 in attorney's fees to plaintiff's counsel, noting that "the District Court calculated [the] fee award . . . without engaging in any measured exercise of discretion." *Id.* As Justice O'Connor put it: "If ever there was a plaintiff who deserved no attorney's fees at all, that plaintiff is Joseph Farrar." *Id.* at 116 (O'Connor, J., concurring). In particular, Justice O'Connor noted that "the relevant indicia of success -- the extent of relief, the significance of the legal issue

on which the plaintiff prevailed, and the public purpose served -- all point to a single conclusion: Joseph Farrar Achieved only a de minimis victory.” *Id.* at 122.

The Court concludes that this case differs in each of these “relevant indicia of success.” Plaintiff’s *pro se* Complaint named three Defendants; two corrections officers and a physician’s assistant charged with providing medical care to inmates at the Piscataquis County Jail. Plaintiff generally alleged that while he was a pretrial detainee at the Jail, the Defendant corrections officers purposely taunted Plaintiff to the point where he would become enraged, thereby justifying punitive action on the part of Defendants. As to the physician’s assistant, Plaintiff alleged inadequate attention to a condition which rendered Plaintiff more susceptible to “anger rages.”

In *Farrar*, the plaintiffs had sought 17 million dollars in damages, and recovered only nominal damages. It is the differential between the amount sought and the amount recovered that so highlighted “the technical or de minimis nature of Joseph Farrar’s victory.” *Id.* at 120. As Justice O’Connor put it: “He asked for a bundle and got a pittance.” *Id.* By contrast, Plaintiff’s prayer for relief in his original *pro se* Complaint stated, in its entirety:

I seek proper medacal [sic] attention. For the cruel and unusual punishment to stop. To be compensated for the hardship I’ve had to endour [sic].

Complaint., Docket No. 1.

Because Plaintiff was permitted to proceed *in forma pauperis*, his Complaint was subject to early scrutiny under 28 U.S.C. § 1915, which permits dismissal of “frivolous” complaints. Plaintiff’s Complaint was not found to be frivolous, and Plaintiff was permitted to proceed. Thereafter, and prior to counsel’s appearance, Plaintiff successfully defended two separate

Motions to Dismiss and brought a successful Motion to Compel the production of documents by Defendants.

Counsel appeared on Plaintiff's behalf, and Plaintiff was permitted leave to amend his Complaint. Summary Judgment was granted to the Defendant physician's assistance on Plaintiff's medical claim. At the final pretrial conference, Plaintiff moved to dismiss one of the two remaining Defendants, and his due process claim against this Defendant proceeded to trial.

Throughout the course of this litigation, Defendant's counsel has repeatedly proffered the argument that Defendant did not exhibit "deliberate indifference to [Plaintiff's] serious medical needs." *Watson v. Caton*, 984 F.2d 537, 540 (1st Cir. 1993) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). The Court, in turn, has repeatedly indicated that it read Plaintiff's Complaint as alleging a due process violation against the Defendant corrections officers. Plaintiff's original Complaint simply stated that Defendants Mesaric and Huard, knowing of Plaintiff's propensity to "anger rages," repeatedly harassed, and prompted officers working under them, to "harass, needle, and antagonize" him. When Plaintiff would respond, the officers would "write him up" and he would be locked down. At the time of his Complaint, Plaintiff had been locked down for 33 days.

At the time of these occurrences, Plaintiff was a pretrial detainee. Accordingly, this alleged treatment would violate his right not to be punished without due process. *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983). The Supreme Court has noted that "the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). For this reason, claimants may bring actions alleging denial of procedural due process for nominal damages where no actual injury occurred. *Id.*

With this factual and legal background in mind, the Court is hard pressed to conclude that Plaintiff's victory in this case was "de minimus" or "merely technical." As noted previously, Plaintiff never sought a great deal in the way of compensatory damages. For the most part, he asked that he no longer be treated in the manner alleged in the Complaint. After hearing the evidence regarding his treatment, a jury concluded, and the Court concurs, that Defendant violated one of Plaintiff's most basic constitutional rights; to be free from "punishment" prior to being convicted of a crime. The import of the statement made to Defendant by way of the verdict cannot be discounted. Presumably Plaintiff has assisted by way of this lawsuit in preventing future abuses of the rights of pretrial detainees at the Piscataquis County Jail.

The Court concludes that Plaintiff is entitled to an award of attorney's fees in this matter. The remaining question is the amount of fees appropriately awarded.

B. Amount of fees.

1. Hourly Rate.

Defendant first argues that Plaintiff's counsel's rate of \$170 per hour is unreasonable and not adequately supported in the record. The Court disagrees. Based upon the Court's own familiarity with the rates of attorneys practicing in the Portland, Maine, area, as well as the Affidavit of Patricia Peard, Esq., despite the fact that it was submitted only with Plaintiff's Reply Memorandum, the Court hereby approves counsel's requested hourly rate of \$170 per hour.

2. Hours Expended.

The Court has carefully reviewed the billing records submitted in support of Plaintiff's request for attorneys fees, and has, to the best of its ability, eliminated hours falling into the following categories:

- A. hours directly related to Plaintiff's claims against Defendant Mesaric and Cichon, *see Phetosomphone v. Allison Reed Group*, 984 F.2d 4, 7 (1st Cir. 1993);
- B. hours spent in excess of that amount reasonably required to complete a task (eg., "trial brief preparation"), *see Weinberger v. Great Northern Nekoosa*, 801 F. Supp. 804 (D. Me. 1992);
- C. hours spent researching inapplicable areas of the law (eg., "eighth amendment");
- D. hours inadequately detailed in the billing records (eg., "trial preparation"), *see, id.*, at 816;

In addition, where possible, the Court has allocated certain of the requested hours to travel, for which it will permit an hourly rate of \$10, together with mileage at the prevailing Government rate of 31¢ per mile. Having made these adjustments, the Court hereby approves attorney's fees in the following amounts:

Mr. Knowles (168 hours at \$170):	\$28,560.00
Paralegal (14.2 hours at \$70):	994.00
Paralegal (2.6 hours at \$60):	156.00
Travel (22 hours at \$10):	220.00
Mileage (1632 miles at \$0.31)	505.92
Total:	<hr/> \$30,435.92

3. Bill of Costs.

Plaintiff's Bill of Costs is allowed in the following amounts:

Service of Process	\$ 16.32
Docket Fees	20.00
Depositions: ¹	
Alfred Cichon, Jr.	0.00
Mesaric & Huard	513.60
Margaret Kelly	294.40
Colin Pope, MD	<u>142.80</u>
	950.80
Photocopies ²	1143.75
Toll Calls	156.97
Westlaw ³	0.00
Auto Reimbursement	0.00
Expert's Fee (Dr. Pope) ⁴	40.00
Total:	<u>\$ 2327.84</u>

Conclusion

Accordingly, the Court ORDERS Defendant to make the following payments to Plaintiff:

- (1) Nominal Damages: \$1.00
- (2) Attorney's Fees: \$30,435.92
- (3) Costs: \$2327.84
- Total Award: \$32,764.76

¹ The Court finds special circumstances existed in this case, in light of counsel's late entry into the litigation and Plaintiff's incarceration, to justify the reasonable costs incurred by counsel in deposing these witnesses. The costs for the deposition of Alfred Cichon are not allowed for the reason that Plaintiff's claim against Defendant Cichon were unsuccessful.

² The Court finds these photocopy costs reasonable in light of Plaintiff's incarceration. *See Rodriguez-Garcia v. Davila*, 904 F.2d 90, 100 (1st Cir. 1990).

³ *See Kimball v. Shalala*, 826 F. Supp. 573, 576-77 (D. Me. 1993).

⁴ 28 U.S.C. § 1821(b).

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on November 13, 1996.